No. 22538

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MECHANICAL SPECIALTIES COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Order of the National Labor Relations Board.

REPLY BRIEF OF PETITIONER.

HILL, FARRER & BURRILL,
CARL M. GOULD,
EDWIN H. FRANZEN,
STANLEY E. TOBIN,
KYLE D. BROWN,
34th Floor,
445 South Figueroa Street,
Los Angeles, Calif. 90017,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Statutes Page

No. 22538

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MECHANICAL SPECIALTIES COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Order of the National Labor Relations Board.

REPLY BRIEF OF PETITIONER.

I.

The Alleged Violation of Section 8(a)(5) of the Act.

A. The Absence of and the Board's Failure to Prove the Union's Majority.

This Brief will not discuss again the plethora of authority already covered in Petitioner's Opening Brief pertaining to the Union's alleged majority. The Board has, at best, attempted to ignore over a dozen Circuit Court cases by scarcely mentioning them in footnote; the Court, however, is again referred to those cases which, upon careful reading, will show, beyond doubt, their applicability to the facts in the instant case. Petitioner will, however, raise one very significant case that was published the day after the filing of its Opening Brief.

In *NLRB v. Southland Paint Company,* 394 F.2d 717 (5th Cir., May 8, 1968), Judge Wisdom, for a unanimous Court, discussed with precision and in detail many of the cases referred to and quoted in Petitioner's Opening Brief. In that case, it might be noted, the employer committeed virtually every unfair labor practice in the book, including conducting wholesale surveillance on employees attending Union meetings, granting raises to employees to spy, establishing a grievance committee, threatening to close the plant and reduce wages, granting general wage increases and vacation benefits, interrogating employees, offering promotions to thwart the Union, discriminatorily demoting employees, improperly discharging three employees, suspending one and refusing to hire another. Nonetheless, the Court, while upholding the Board on all those counts, recognized that a totally different test is involved in viewing an 8(a)(5) refusal to bargain charge.

The Court reviewed the entire history of the so-called *Bernel Foam* and *Cumberland Shoe* doctrines, and in so doing quoted and echoed Judge Friendly's holding in *NLRB v. S. E. Nichols Company,* 380 F.2d 438 (2d Cir., 1967):

> "But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is not the end; the clearest written words can be perverted by oral misrepresentations, *especially to ordinary working people unversed in the 'witty diversities' of labor law.* It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality. . . ." (Emphasis in original.) (394 F.2d at 728-29.)

In the instant case, the Board, both in its decision and its brief, once again ignores the fact that Petitioner's employees were constantly told by Union officials and adherents and by literature that the cards had one purpose: the securing of an election. The Board totally ignores the fact that these employees, for the most part, were totally unsophisticated in labor law, the majority of them were of foreign background or recent arrivals in this country, and were clearly hoodwinked. Indeed, the Board completely ignored the specific testimony to this effect that is found in Petitioner's Opening Brief, pages 37-59, including the testimony of 19 specific employees who were individually deceived.

The Court in the *Southland Paint* case set forth in exact detail the nature of the misrepresentations made to the employees in that case by Union adherents (394 F.2d at 731, n. 19). The evidence pointed out there is indistinguishable from that in the instant case. Judge Wisdom, after pointing to that evidence, stated:

> "We have reviewed the record with more than usual care. . . . [T]here is undisputed evidence that the solicitors told at least as many as a *dozen* employees that a purpose of the cards was to obtain an election. At least eight and perhaps more employees were permitted to sign under the impression that the cards were to be used to obtain an election. Except in one instance, the trial examiner did not discredit the signers' testimony; he disregarded it." (Emphasis in the original.)

The Trial Examiner and the Board in the instant case did the exact same thing.

The Court in *Southland Paint* again cited the *S. E. Nichols* case, *supra,* noting:

> ". . . Judge Friendly noted that the cards, unlike those in *Engineers & Fabricators (but like the cards in the instant case),* [and in this instant case] did not contain an acceptance of union membership, 'one thing an employee could readily understand'. Bearing in mind that 'the function of authorization cards . . . is to demonstrate that a majority of the employees have 'clearly manifested an intention to designate the Union as their bargaining representative' (*Englewood Lumber Co.*) . . . there seems to be no reason why cards could not state in large type that if a majority signed, the union would claim representative status without an election'. 380 F.2d at 442. We agree."

We submit that this Court should pick up the clarion call that cards, to have the efficacy the Board would give them, should contain language to the effect that the Union can claim representative status without an election. Indeed, we understand, unofficially, that the Board is contemplating the promulgation of such a rule.[1]

In its Brief, the Board attempts to dismiss the clear significance of the Union's misleading and false circulars as to the purpose of the cards by stating that "nearly all the employees had signed the cards before the issuance of these circulars . . ." (Bd. Br. 38.) In the first place, these circulars merely *confirmed* what Union officials and adherents were telling the employees: the cards were simply to bring about an election. *Moreover,* the fact is, which the Board cannot deny, that the Union did not have a majority of signed cards prior to March 3 when the first known false circular was distributed. At least 12 employees signed their cards on or after that date. If these cards, therefore, are tainted with the fraud that is clearly made apparent by the circulars *alone,* then the Union's alleged majority disappears.[2]

The Board would make it appear that Petitioner seeks to overturn the Trial Examiner's resolution of

---

[1]The Board's Associate General Counsel suggested the need for some reform when, after reviewing the law in this field, he stated that unions who desire to rely on cards as proof of their majority "would be well advised . . . in soliciting employees, not to make representations which might raise questions as to whether the signing employees freely and genuinely intended to designate the union as their collective bargaining representative." Gordon, "Union Authorization Cards and the Duty to Bargain", 33 Daily Labor Report, BNA, Feb. 15, 1968.

[2]See G.C. Ex. (authorization cards) Nos. 33, 40, 52, 56, 59, 65, 67, 68, 73, 74, 81 and 96.

conflicting testimony and that it is merely a question of credibility involved. (Bd. Br. 39-40.) In the final analysis, however, there is no avoiding the fact that the only basis of the Trial Examiner's finding discrediting the testimony of numerous employees as to their reason for signing cards was his own unique and extraordinarily unsophisticated position that "one who preferred not to have a union would probably prefer also not to have an election and would not sign a card." [R. 29.] This is the crux of his entire holding on this part of the case and it is a position that if it has ever been advanced by anyone, has been totally denounced by all specialists in the area and completely denied by all information available, including the AFL-CIO Guidebook for Union Organizers (1961).

Furthermore, the Board asserts that the Trial Examiner credited testimony of Sloane that he advised the employees that the cards would be presented to the company but that the company would in all probability turn them down and only then would there be an election. (Bd. Br. 3-4; 39; 41.) The references to the record by the Board for this statement not only show he made no such finding but, in point of fact, he found essentially the opposite.

> "Vincent Sloane, the Union's representative in charge of the campaign, told the gathering, he testified, that the Union was attempting to obtain status as bargaining representative throughout the entire industry in Southern California, and that this would come about through elections conducted by the National Labor Relations Board." [R. 24-25.]

Moreover, the Board subsequently (Bd. Br. 41) names eight employees who were present at that meeting where Sloane allegedly made such statements and infers they heard such statements. Every one of those named employees, with the conceivable exception of one, essentially denied that Sloane made any such statement.[3] Even if, against the great weight of evidence, the Trial Examiner had credited Sloane, it could be of no avail to the Board's position. In *Crawford Mfg. Co. v. NLRB,* 386 F.2d 367 (4th Cir., 1967), *cert. den.* 390 U.S. 1028 (1968), the Union agent made virtually the same statements that Sloane said he made but the Court there indicated that such assertions only cause confusion and do not support the Board's position. (*Id.* at 370-71.)

In an effort to undermine the testimony of 19 employees who stated or indicated that they signed cards for the purpose of having an election, the Board (Bd. Br. 40-41) adopts the extraordinary argument that because many of these employees voluntarily attended one or more Union meetings, they "obviously" were interested or in favor of the Union or at least more so than those that did not attend meetings. If this novel argument has any substance, they why bother with elections at all? Indeed, why bother with authorization cards? Why not just count people who go to Union organizational meetings? Patently, employees attend organizational meetings for a multitude of reasons. Curi-

---

[3]Cisneros [R.T. 585-586]; Cuda [R.T. 1504, line 18, to 1505, line 7]; Dellomes [R.T. 1356]; Garger [R.T. 1518, lines 2-5]; Kofink [R.T. 505, line 24, to 508, line 22]; Lawrence [R. T. 1479, line 16, to 1480, line 15; 1484]; Weymar [R.T. 518, line 29, to 519, line 5; 529, line 19, to 530, line 13; 531, lines 14-23]. See also Opening Brief, pp. 40-46.

osity, coercion, and, maybe, just a chance to get away from the house could be principal reasons.[4]

Finally, the Board's brief tries to deprecate the testimony of the many employees, witnesses both of the General Counsel and Petitioner, because, allegedly, their testimony was "induced." Neither the Board nor the Trial Examiner found, nor was there any charge, that the Petitioner's actions in preparing for trial were in any way improper. Even more importantly, however, is the fact that the Board found it necessary to torture the record even to make such an assertion. Not only do the transcript references cited by the Board fail to support its assertion [Bd. Br. 45; R.T. 367-370; 532-536; 639-642], but, quite the contrary, they show that these employees voluntarily and genuinely sought to place the true facts before their employer. Contrary to the implication in the Board's Brief, these employees never changed their minds; they simply sought to prevent a *tour de force* by the Union which they considered to be not only totally unjustified but fraudulent.[5]

---

[4]The Board also argues that none of the employees asked the Union or its solicitors for the return of their cards after the recognition request. (Bd. Br. 41.) Clearly, even if they knew of the request, why should they have asked for the return of their cards? The Union said it was going to have an election and an election was had. But it was only after the Union lost the election, for the first time, did it advise the employees that it would seek recognition nonetheless. The employees were never told that the Union could do this beforehand. And after the election, the majority of the employees ruefully learned that it was too late to ask for their cards back.

[5]In addition, the Board takes issue with Petitioner's arguments that three particular authorization cards could not be used for determining a majority. (Bd. Br. 33-34.) The Court is respectfully directed to a very recent case, in addition to those cited in the Opening Brief on this point, *NLRB v. Texas Electric Cooperatives Inc.*, ... F.2d .... (5th Cir., Aug. 5, 1968). Nei-

(This footnote is continued on the next page)

B. Petitioner's Refusal to Bargain Was Bottomed Entirely Upon a Good Faith Doubt as to the Union's Majority.

After this Reply Brief had been set in galley this Court's decision in *NLRB v. Sonora Sundry Sales, Inc.*, ... F.2d .... (9th Cir., Aug. 2, 1968) was published by the services. This Court in that case, it is submitted, strongly supported this Petitioner's position that when an employer has reason to believe that employees signed authorization cards intending only to express a wish for an election and a union engages in misrepresentations in order to procure such cards, there is a sufficient basis for a good faith doubt, justifying the refusal to recognize the union. In the instant case the Petitioner had solid reason for doubting the union's alleged majority, as indicated in detail in Petitioner's Opening Brief and in Appendix C thereof, and the union's misrepresentations were manifest.

The Trial Examiner and Board found a lack of good faith doubt solely on the alleged 8(a)(1) and 8(a)(2) violations. [C.T. 30.][6] Most of the alleged 8(a)(1) violations, as will be shown below and as has been shown in the Opening Brief, can hardly be sustained and

---

ther the Board nor Trial Examiner made any finding whatsoever that these particular cards were properly authenticated. Petitioner finds it unnecessary to add anything further to what it has said on this matter (Opening Br. 10-11, n. 6), except to answer that Meier, one of the individuals whose card is in question, was the same employee who was the first to advise Petitioner of the Union's organizational drive; he further told the company's president that he did not want to see the Union in the shop. Meier also told him to call him at his home, but the latter did not do so. [R.T. 757-758; 910-911.]

[6]The findings of violations of Section 8(a)(3) do not enter into the good faith doubt position as the Trial Examiner at no time relied upon them in finding an 8(a)(5) violation. Of course, one of the terminations occurred two weeks after the election.

are, at best, tenuous. Yet the Board in its Brief, as it is prone to do in almost all of these cases, paints the blackest picture possible of the Employer's actions in an effort to have a circuit court rubber-stamp the draconian remedy it proposes.

Recent circuit court cases have shown, beyond doubt, that even in situations where employers have committed wholesale and serious unfair labor practices, this may not, by itself, meet the burden imposed upon the General Counsel to establish a lack of good faith doubt. The Sixth Circuit was confronted with this question in *NLRB v. Fashion Fair, Inc.,* ..... F.2d ..... (6th Cir. July 30, 1968). There, a unanimous Court upheld the Board's conclusions that the employer had violated Section 8(a)(1) and 8(a)(3) by threatening employees with discharge for engaging in organizational activity, by interrogating them as to organizational activity, and by promising them benefits if they refrained from giving support to the Union. The Court further upheld the Board's finding that the company had discharged the Union's most active supporter for his Union activities and had improperly granted sick leave benefits. Nonetheless, the Court held the General Counsel had not satisfied his burden of proving bad faith by the Employer. Citing many of the cases discussed in Petitioner's Opening Brief, the Court held that while the Employer's conduct may warrant setting aside the election, knowledge of a Union's unsuccessful past attempts to gain recognition by an election was, alone, adequate grounds for a good faith doubt. In the instant case, Petitioner had knowledge of the voluntary statements of the majority of its employees at the time of the demand that they did not want Union represen-

tation; Petitioner had proof positive of the Union's misrepresentations that the authorization cards were being solicited solely to obtain an election.

In a previous Sixth Circuit case, *Pulley v. NLRB,* ..... F.2d ..... (June 5, 1968), 11 employees were individually interrogated as to their Union membership and activity and were asked to report the names of other employees engaged in Union activity; the employer created the impression that it was keeping Union meetings or attendance under surveillance. Once again, though the Court upheld the Board's unfair labor practice findings, the Court held the General Counsel had failed to meet his burden of proof that the employer acted in bad faith. The Court noted that of the 11 employees who were the objects of the employer's unfair labor practices, 9 of them were strongly committed to the Union and that, therefore, it appeared that the illegal activities had little, if any, effect upon the freedom of choice guaranteed by the Act nor did this activity prevent other employees from signing cards. In the instant case, virtually every finding of interrogation and threats by Petitioner concerned strong Union adherents who clearly were not affected. The Court in *Pulley* further found no evidence that the employer's conduct dissipated the Union majority. Such is the case here; there is completely absent from the Trial Examiner's decision any *finding* that the alleged unfair labor practices dissipated the alleged Union majority. Board law requires that to negate an employer's good faith doubt, it must be found that the unfair labor practices were *in fact* responsible for the loss of Union majority. *McQuay-Norris Mfg. Co.,* 157 NLRB 131 (1966).

The Fourth Circuit has recently joined the majority of circuits in rejecting the Board's position on this point. In *Benson Veneer Co. v. NLRB,* ..... F.2d .... (4th Cir., July 8, 1968), the Court upheld the Board's finding that the employer violated Section 8(a)(3) by discharging six Union supporters in an effort to discourage Union activity, coercively interrogated employees, engaged in surveillance, threatened employees that the company would close the plant and that other serious harm would befall them. Nonetheless, again the Court stated that notwithstanding such activity, "we do not see the logic in branding the employer's queries as in bad faith just because it loses its balance and oversteps the line," citing *S. S. Logan Packing Co.,* 386 F.2d 562 (4th Cir., 1967) and *NLRB v. Dan River Mills,* 274 F.2d 381, 388-89 (5th Cir. 1960.)[7]

Respondent supports its position and relies heavily upon this Court's decision in *NLRB v. Luisi Truck Lines,* 384 F.2d 842 (9th Cir., 1967). That case is clearly inapposite, however. The alleged good faith doubt of the employer there was bottomed *entirely* upon the employer's erroneous doubt of the appropriateness of the requested unit. The Board has repeatedly held that such a doubt, even if held in good faith, is no defense to a refusal to bargain charge. *Benson Wholesale Co., Inc.,* 164 NLRB No. 75 (1967); *Tonkin Corp. of Calif.,* 165 NLRB No. 61 (1967), *aff'd, Tonkin Corp. v. NLRB,* 392 F.2d 141 (9th Cir., 1968). A very recent

[7]On June 28, 1968, the Fourth Circuit, in a number of cases involving wholesale unfair labor practices on the part of employers, nonetheless found that a good faith doubt could still be had by the employer and rejected the Board's 8(a)(5) findings. See *General Steel Products v. NLRB,* ..... F.2d .....; *NLRB v. Gissel Packing Co., Inc.,* ..... F.2d .....; *NLRB v. Heck's, Inc.,* ..... F.2d ....., all decided June 28, 1968.

Circuit Court decision in *NLRB v. Bardahl Oil Co.*, ... F.2d .... (8th Cir., Aug. 9, 1968) recognized that even a good faith misunderstanding of an appropriate unit does not justify a refusal to bargain; the Court, however, emphasized that a good faith doubt based upon whether the union represents a majority in the claimed unit is another matter. The distinction is justified in that a good faith doubt based upon majority lessens the dangers that a union will be forced upon a nonconsenting majority; the same danger does not attach where the majority status of the union is conceded and only the question of the appropriate unit in involved. In the instant case, Petitioner's good faith doubt was bottomed entirely upon significant evidence that the Union did not have a true majority in the unit sought by the Union. A good faith doubt on these grounds will excuse an employer's failure to recognize a union. See *NLRB v. Security Plating Co.,* 356 F.2d 725, 727 (9th Cir., 1966); *NLRB v. Hyde,* 339 F.2d 568, 570 n. 1 (9th Cir., 1964). And concommitant unfair labor practices of the types involved in this case do not negate the evidence upon which the good faith doubt came about.

The Trial Examiner did not discredit the tremendous amount of evidence supporting Petitioner's good faith doubt; he simply ignored it. Yet there can be no question, to begin with, that the Employer's Exhibits 4, 5 and 6 *clearly* gave more than adequate reason to believe that the Union was deceiving the employees. Certainly, a good faith doubt on this alone must be sustained; the Board totally ignores this.

The Board indicates that the factual basis for the determination of a good faith doubt by Fink and

Howland is suspect and cannot be given weight. (Bd. Br. 49.) Yet, their conclusions were fully supported by the testimony of virtually every single witness in this case. The Board would have us ignore virtually all the testimony supporting Employer's Exhibit 7. There is absolutely no justification for this type of decision making.[8] The Board totally ignores the fact that the employees' statements, as indicated by the numerous citations to the record in Appendix B to the Opening Brief, were made voluntarily and freely, and it simply brushes off the testimony concerning each of the employees (Appendix C) showing beyond question that Petitioner was totally justified in believing a majority of its employees opposed the Union.[9]

Finally, the Board holds that Fink and Howland had no evidence at the time of their discussion that the Union was over-reaching in obtaining cards and that Attorney Gould was given no information as to the majority status question when he advised his client. Such an assertion is patently contrary to the record. [R.T.

---

[8]The Board states that the company admitted it had no knowledge concerning the circumstances under which the Union's cards "may have been obtained." (Bd. Br. 46-47; 49.) This is a totally unjustified twisting of the record. Petitioner in its rejection of the Union's demand stated unequivocally that it did not believe that its employees had authorized the Union to represent them "freely, voluntarily and without coercion." It added it had no knowledge of the "authenticity" of the cards or how they may have been obtained. Surely, Petitioner could not vouch as to whether cards had been forged, but it knew that the Union had misled the employees and this goes to the question of the cards' "validity." (G.C. 39.)

[9]The Board urges that the assessment of Union strength by Petitioner was the result of illegal questioning of employees. The Trial Examiner made no such finding and such an assertion (Bd. Br. 50) is completely negated by the evidence. See Appendices B and C attached to Opening Brief. See also *Benson Veneer Co. v. NLRB,* ..... F.2d ..... (4th Cir., 1968).

791, line 12, to 794, line 14; 886, line 16, to 888, line 18; 929, line 24, to 934, line 5; 950, line 9, to 959, line 12; 994, line 19, to 999, line 4, 1174, line 1, to 1175, line 19.][10]

II.

The Section 8(a)(1) Finding With Respect to the Wage Increase Is Premised on Mere Conjecture Rather Than Substantial Evidence; the Further Findings Based Upon Questioning and Alleged Threats Are the Product of an Erroneous Interpretation of the Law.

A. The Wage Increase.

Petitioner voices no disagreement with *NLRB v. Exchange Parts Co.,* 375 U.S. 405, cited by the Board (Bd. Br. 14-15), holding that the conferring of economic benefits by an employer with the express purpose of discouraging union activity violates Section 8(a)(1) of the Act. But *Exchange Parts* merely states the legal result which flows from given facts (there the employer *admittedly* granted benefits to influence employee choice). The case affords no guidance at all for the decision as to whether or not any particular change has been improperly motivated.

---

[10]In *NLRB v. Ben Duthler, Inc.,* ..... F.2d ..... (6th Cir., May 2, 1968), the Court noted that an attorney had advised the employer in an effort to determine the Union's representative status and that the Trial Examiner had refused to consider this evidence.

> "Such reasoning ignores the only purpose Mr. Duthler's consultation with his attorney might serve: to benefit from the attorney's knowledge of the situation and his experience and expertise in labor matters. Whatever knowledge and experience his attorney had must be attributed to Mr. Duthler, who acted in accordance with his attorney's advice."

Other authorities relied upon by the Board are equally inappropriate. For example, *Betts Baking Company v. NLRB,* 380 F.2d 199 (10th Cir., 1967), involved *direct evidence* of unlawful employer intent. No such evidence exists here. Similarly, this Court in *NLRB v. Laars Engineers,* 332 F.2d 664 (9th Cir., 1964), furnished no support for the Board's position. Indeed, if anything, that case operates in Petitioner's favor. There the Court founded its decision on the fact that the employer had departed in significant respects from his past practice in granting wage increases. No such evidence of departure exists here. The uncontradicted evidence is that Petitioner's wage increase was in total accord with its prior practice. [R.T. 938-942; R. Empl. Ex. 10.] See *Advance Envelope Mfg. Co.,* 170 NLRB No. 166 (1968). The Board's statement (Bd. Br. 16) that Petitioner expanded the coverage of the proposed raises beyond those employees covered in the survey misses the mark if it is an attempt to stigmatize that action. Approximately 20 top rate increases resulted from the survey. [R.T. 897; 1148.] At the same time, as Petitioner had always done, employees not at the top rate were considered for general merit increases. The increases which followed [45 or 50 out of 115 shop employees; R.T. 1149] were less in number and percentage than prior years where as many as 80 merit increases were given. [R.T. 1148-1149.][11]

The Board's crucial error is in having disregarded overwhelming evidence of unlawful motivation in favor of raw conjecture—*i.e.,* that the increase was unlawful because of a mere coincidence in time with beginning

[11]At one time in the recent past, practically everyone in the shop had received a merit increase. [R.T. 1151.]

union activity. Timing is a proper factor to consider, but it is rarely, if ever, that an 8(a)(1) finding is hinged on that factor *standing alone.* And even this flimsy ground does not withstand scrutiny. The Board has conceded that the wage survey was first discussed in December 1964, well prior to the advent of any union activity at Petitioner's plant. [C.T. 24.] The survey was completed and top rate increases decided upon in mid-February, 1965 [R.T. 840-841; R.Ex. 18; C.T. 24] when there was still no notice of Union activity. First knowledge of Union organizational efforts came to Petitioner via an anonymous phone call on February 22, 1965 [R.T. 765-766; 909-910] and the first industry-wide Union meeting was not held until February 28, more than a week after the final decision on increases had been made.

Admittedly, on March 8, 1965, when the increases first appeared on employee paychecks, the company was aware of some Union activity. But this knowledge did not oblige it to withhold an otherwise lawfully conferred raise especially when there had as yet been no demand for recognition, and no petition for an election. While the absence of a Union demand or petition does not guarantee proper motivation, it is certainly entitled to great weight. And when this factor is supplemented by abundant evidence of economic necessity and accord with past policy, as here, there can be no other conclusion than that the Board's finding lacks the support of substantial evidence and, therefore, must be reversed. *NLRB v. Universal Camera Corp.,* 340 U.S. 474 (1951).

B. Questioning of Employees.

The Board falls into serious error when it contends (Bd. Br. 16-18) that the incidents of questioning adverted to by the Trial Examiner, standing independently, constituted violations of Section 8(a)(1). This flatly contradicts the Trial Examiner's own finding, adopted in its entirety by the Board, that such incidents were rendered coercive, and, therefore, unlawful, *not because of any inherent threat in the conversations themselves,* but rather because the incidents occurred against a background of allegedly improper statements that a Union might force Petitioner out of business.

The Trial Examiner could not have been more explicit on this point:

> "I find in late February and in March the Respondent [Petitioner] questioned some of its employees concerning their interest in the Union *and that because some of this questioning was in a context of threats that a union might force the Respondent out of business it constituted interference, restraint, and coercion of employees in violation of Section 8(a)(1) of the Act."* [C.T. 32, lines 19-23.] (Emphasis supplied.)[12]

Clearly, by utilizing the so-called surrounding "context of threats" to support a Section 8(a)(1) violation, the Trial Examiner has conceded that the specific epi-

---

[12]The Trial Examiner's Conclusions of Law again demonstrated his position: "By threatening the close of business in the event of Union victory in the representation election and by questioning employees concerning their union preferences *in the context of coercion* the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act." [C.T. 38, lines 36-49.] (Emphasis supplied.)

sodes of questioning considered alone were not sufficient to justify an unfair labor practice finding. To the extent, therefore, that the Board now urges the independent significance of this questioning, it distorts the record by contending upon a ground for which neither the Trial Examiner nor the Board ever held.

Indeed, the Board's decision on this point can only be construed as implicit agreement with Petitioner's contention that the conversations contained no promise of benefit or threat of reprisal and were, thus, an exercise of free speech protected by Section 8(c) of the Act. *Don the Beachcomber v. NLRB,* 390 F.2d 344 (9th Cir., 1968); *Bourne Co. v. NLRB,* 332 F.2d 47 (2d Cir., 1964).

C. Alleged "Threats" of Plant Closure.

We reemphasize a point made in the Opening Brief —if the "threats" of plant closure were in fact legitimate campaign predictions, protected by the Act, then Petitioner's conversations with employees are automatically vindicated as well because the background "context of threats", expressly and exclusively relied upon by the Board to find these conversations unlawful, will have disappeared.

This Court need go no further than its own recent decision in *NLRB v. TRW-Semiconductors, Inc.,* 385 F.2d 753 (9th Cir., 1967), to conclude that the Petitioner's campaign speeches and literature fell well within permissible limits. Despite the Board's futile at-

tempts to distinguish it, the case remains squarely on point and fully answers each of the contentions raised in the Board's brief. For example, it is argued that Weitzel's speech of March 9, wherein he stated that the Company "could" (not *would*) go out of business because of the Union was a veiled threat to shut down if the Union prevailed. But one isolated sentence in one speech is no testing ground. The material must be viewed in its entirety. On two separate subsequent occasions, Petitioner made it crystal clear that it would never, on its own, discontinue operations.[13]

The literature cited by the Board as "threatening" contained nothing more than predications of what the *Union* might do or cause—unsound demands and potential strikes with their resultant effect on scheduling and inconvenience to customers were typical examples. [G.C. Ex. 9; 15; C.T. 28, lines 10-28.] This Court's holding in *TRW-Semiconductors, Inc., supra,* is dispositive of the question: "There is no suggestion that the employer will reduce benefits or cut jobs if the employees vote for the union. *The prediction is that the union may or will cause such losses through strikes. There is also a prediction that the union's presence may or will cause loss of customers, to the possible or even probable detriment of employees. Such arguments, too are protected by Section 8(c).*"

---

[13]See Weitzel's June 10 speech [G.C. Ex. 19, p. 27], and Fink's June 8 letter [G.C. Ex. 17] quoted at page 87 of the Opening Brief.

The Board further argues (Bd. Br. 21-22) that the Mars-Falco-Alba theme was coercive because the Company's statements that these tool and die shops had closed on account of union problems had no factual or legal basis. Of course, with respect to Falco, Petitioner had every reasonable basis for such a contention: Falco's former president, Skulsky, had written Petitioner a letter to that effect. [C.T. 28, lines 10-28.] Moreover, the Union had sufficient opportunity to rebut these claims, if it could have done so, but made no response. Petitioner contends that everything about Falco-Mars-Alba was factually correct, but no different result is dictated if this were not the case. Again, *TRW-Semiconductors, Inc.* hits the mark:

> "Section 8(c) does not protect only those views that are correct, *nor does it forbid them because they are demonstrably incorrect. The remedy is for the union to answer them, not a cease and desist order.*" (Emphasis supplied.)

Finally, in typical fashion, the Board refers to Petitioner's "other coercive conduct," totally unspecified, as support for its determination to "discount subtle attempts to shift responsibility" for plant closure to the Union. (Bd. Br. 23.) This bit of administrative sophistry is accomplished without benefit of a single record citation and despite clear evidence that the Employer's statements were exactly what they purported to be: lawful predictions as to events over which it would have no control. See *Southwire Co. v. NLRB,* 383 F.2d 235 (5th Cir., 1967); *NLRB v. Morris Fishman & Sons, Inc.,* 278 F.2d 792 (3rd Cir., 1960); *NLRB v. Wilson Lumber Co.,* 355 F.2d 426 (8th Cir., 1966); *NLRB v. Uniform Rental Service Inc.,* ..... F. 2d ..... (6th Cir., 1968).

III.

The Grievance Committee (Sec. 8(a)(2)).

Demonstrating an inclination to place great emphasis on the trivial, the Board persists in citing to the Grievance Committee as an illustration of employer misconduct. Petitioner acknowledges that it suggested revival of the Committee to discuss topics of mutual concern on March 9, 1965, some two weeks *prior* to the filing of the Union's representation petition and at a time when, to Petitioner's knowledge, Union activity was minimal.

A wide range of subjects was discussed during several subsequent meetings of the Committee and the company carefully pointed out that it was legally prevented from, and would not, make promises with respect to any item under discussion. [C.T. 26, lines 43-49.] With the prescience that stems from hindsight, the Trial Examiner and Board have seized upon these innocuous meetings, inflated the importance of the subjects discussed all out of proportion [*e.g.,* company agreement to pay for indicator points which cost $1.50, Bd. Br. p. 7; Tr. 825-827] and attempted to make a major issue out of a violation which, if it is such at all, remains highly technical at best.

IV.

The Terminations of Cantrell and Klein (Section 8(a)(3)).

A. The company's explanation of Cantrell's termination "fails to withstand scrutiny" (Bd. Br. 27) only if all of the relevant evidence on the point is ignored, as the Board has done. To illustrate, the Board contends that there really was no reduction in Cantrell's work, entirely disregarding uncontradicted testimony that he was the only night milling machine operator in the plant at a time when a significant reduction in milling machine work occurred. [R.T. 1025-1026; 1646-1651; 1107; 1098-1100.] Since his layoff, no one has ever been hired as a replacement on the job he performed. [R.T. 1697; 1108.] Moreover, Cantrell was not offered a job on the jig-bore because management was never aware that he had any experience on the machine, if indeed he did.[14] Further, he had unequivocally refused a jig-bore trainee job twice before. [R.T. 1101-1102; 1640-1641; 1693.] In these circumstances, the Company understandably gave no consideration to Cantrell, especially as it required an *experienced* man. There is no objective evidence supporting the Board's inference of discrimination, aside from possible knowledge that he was a Union adherent. This, of course, does not operate to prevent a discharge for proper cause. *Lawson Milk Co. v. NLRB,* 317 F.2d 756, 760 (6th Cir., 1963); *Crawford Manufacturing Co. v. NLRB, supra.*

---

[14]Cantrell claimed he told Fink that he had jig-bore experience and wanted the job. Management officials denied this, stating that Cantrell had never relayed such information. The only *objective* evidence, Cantrell's application for employment, stated nothing about prior jig-bore experience. [R.T. 1044-1045; R. Ex. 11.]

B. Klein was not terminated until two weeks *after* the election which Petitioner had won by a substantial margin. [C.T. 34, lines 39-40.] Klein was terminated because, as the Trial Examiner found, "Klein's profit and loss statement [between March and mid-June 1965] shows an almost unbroken string of losses ranging from $179 to $839." [C.T. 36, lines 54-55; R. Ex. 18; R.T. 1266, lines 3-6; R. Ex. 17.] Considering the record as a whole, the Board's finding is not supported by substantial evidence.

When there is no direct evidence of discrimination, as here, the Board traditionally invokes its so-called "expertise" in labor matters as a sufficient basis for its determination. Thus, the Board's statement, unaided by evidence, that the Company's explanation for Klein's discharge does not "ring true." (Bd. Br. 29.) But the cases are clear that the burden of proof is on the General Counsel to show that some part of the company's motivation was discriminatory. *NLRB v. Swan Super Cleaners, Inc.,* 384 F.2d 609 (6th Cir., 1967). This burden is not sustained by a Board view, unsupported by substantial evidence, that the discharge was for insufficient cause. *NLRB v. Houston Chronicle Pub. Co.,* 211 F.2d 848, 854 (5th Cir., 1954); *NLRB v. Wagner Iron Works,* 220 F.2d 126, 133 (7th Cir., 1955).

Respectfully submitted,

HILL, FARRER & BURRILL,
CARL M. GOULD,
EDWIN H. FRANZEN,
STANLEY E. TOBIN,
KYLE D. BROWN,
Attorneys for Petitioner.